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Nos. 86-495, 86-624 and 86-625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STATES OF AMERICA, *et al.*, K MART CORPORATION and 47TH STREET PHOTO,
Petitioners,
v.

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, CARTIER, INC., and CHARLES OF THE RITZ GROUP, LTD.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

WILLIAM H. ALLEN *
EUGENE A. LUDWIG
SCOTT D. GILBERT
ELIZABETH V. FOOTE
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Respondents

* Counsel of Record

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QUESTIONS PRESENTED

1. Section 526 of the Tariff Act of 1930 makes unlawful, without relevant exception or qualification, the importation of goods of foreign manufacture bearing a trademark identical to a United States trademark owned by a corporation created within the United States and properly registered in the Patent and Trademark Office, in the absence of the trademark owner's consent to the importation. The question on the merits is whether regulations of the Customs Service that make the lawfulness of the importation of such goods turn on the relationship of the United States corporation to the owner of the identical mark affixed abroad are valid under Section 526.

2. The jurisdictional question is whether a United States district court, whose jurisdiction of trademark cases rests on 28 U.S.C. §§ 1331 and 1338(a) and 15 U.S.C. § 1121, has jurisdiction of an action arising under Section 526 of the Tariff Act of 1930, which forbids the importation of goods bearing certain trademarks without the trademark owner's consent, or whether exclusive jurisdiction lies in the Court of International Trade under 28 U.S.C. § 1581.

PARTIES TO THE PROCEEDING

The petitioners are the United States of America, James A. Baker, III, Secretary of the Treasury, and William von Raab, Commissioner of Customs (No. 86-625); K mart Corporation (No. 86-495); and 47th Street Photo, Inc. (No. 86-624). The respondents are the Coalition to Preserve the Integrity of American Trademarks, Cartier, Inc., and Charles of the Ritz Group, Ltd.[1]

[1] The respondent Cartier, Inc., is a wholly owned subsidiary of Cartier International, Inc., which is a wholly owned subsidiary of Cartier International B.V., a Dutch corporation. Cartier, Inc., does not have any non-wholly owned subsidiaries or any affiliates, except foreign affiliates. Since the filing of Respondents' Brief on Certiorari, respondent Charles of the Ritz Group, Ltd., has been sold by its former parent, Squibb Corporation, to its current parent, Yves Saint Laurent International, S.A., a French corporation. Charles of the Ritz Group, Ltd., does not have any subsidiaries or affiliates, except foreign affiliates, that are not wholly owned by it or by Yves Saint Laurent International, S.A. A list of members of the respondent Coalition to Preserve the Integrity of American Trademarks is contained in the Addendum to this brief, pp. 10a-11a, *infra*.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Gov't Pet. 1a-32a) is reported at 790 F.2d 903. The opinion of the district court (*id.* at 34a-50a) is reported at 598 F. Supp. 844.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1986. (Gov't Pet. 51a.) Petitions for rehearing were denied on July 18, 1986. (*Id.* at 53a.) The petition for a writ of certiorari in No. 86-495 was filed on September 26, 1986, and the petitions in Nos. 86-624 and 86-625 were filed on October 16, 1986. The writs were granted on December 8, 1986. 107 S. Ct. 642; J.A. 86-88. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526, 28 U.S.C. §§ 1331, 1338(a) and 1581, Section 39 of the Lanham Trademark Act of 1946, 15 U.S.C. § 1121, and 19 C.F.R. § 133.21. They are reproduced in the Addendum to this brief.

STATEMENT

Section 526(a) of the Tariff Act of 1930 prohibits the importation into the United States of "any merchandise of foreign manufacture" if that merchandise "bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States" and recorded with the Customs Service, unless the written consent of the United States trademark owner is given to the importation. 19 U.S.C. § 1526(a). (Pp. 1a-3a, *infra.*) The Customs Service adopted regulations in 1972 that drastically pare down the apparent coverage of this statute by making it inapplicable when a United States corporation itself affixes the trademark to the foreign merchandise, is related as parent or subsidiary to the affixing corporation or is otherwise under common ownership or control with it, or has authorized the affixing. 19 C.F.R. § 133.21(c). (Pp. 4a-5a, *infra.*) Thus, goods manufactured for markets other than the United States but that bear a trademark identical to the United States trademark may be imported into the United States by unrelated third parties, without the United States trademark owner's consent, when one of the corporate or transactional relationships described in the regulations exists.

These Customs Service regulations purportedly interpreting Section 526 have fostered the phenomenon known as the gray market or parallel importation or diversion of goods.[1] The terms describe the purchase abroad of

[1] None of the descriptive terms is wholly satisfactory. "Gray market" is obviously pejorative; "diversion of goods" is only some-

trademarked goods manufactured for sale in markets other than the United States and their importation into the United States without the consent of the United States trademark owner. The gray market bloomed in the early 1980s.[2] Its growth prompted efforts by United States trademark owners to stop the diversion of their goods. Efforts to stop diversion short of this country's borders are often ineffectual because of the practical or legal difficulty or impossibility of preventing sales in foreign countries to third-party diverters.[3] The trademark owners therefore turned to litigation to bring about the enforcement of Section 526 according to its terms. (*See* pp. 8-9, *infra.*)

The Gray Market

The gray market is associated with products that enjoy a high degree of trademark recognition. The list of such products is a long one: soft drinks, soaps and detergents, baby products, film, outboard motors, musical instruments, heavy equipment, toys, games, and clothing, in

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what less so. "Parallel importation," the phrase favored on the other side of the issue, incorrectly implies both that the goods manufactured for the United States market are always imported and that the "parallel" or "gray-market" products are necessarily identical to them. Neither proposition is true.

[2] Statements made under penalty of perjury in support of the motion of these respondents for summary judgment (J.A. 2, No. 8) are in the district court record and the record on appeal (though not reproduced in the joint appendix in the court of appeals). For the recent flourishing of the gray market, *see* Statements of Robert H. Miller ¶¶ 7-9, Aaron Altman ¶ 8.

[3] For example, French law generally prohibits a supplier's refusal to deal, Price Ordinance No. 45-1483 of June 30, 1945, Art. 37(1)(a), *reprinted in* Plaisant (France) B3, *World Law of Competition*, Pt. 4, Annex 2 at FRAGA 2-2 (J. von Kalinowski ed. 1986), and the complexity of exemptions for limited types of distributorships poses effective practical barriers to private control of trademarked goods. *See also* Statement (n.2, *supra*) of Robert H. Miller ¶¶ 17-20 (describing efforts of Charles of the Ritz to prevent diversion).

addition to cameras, binoculars, watches, perfumes and cosmetics, chinaware, and electronic goods.

Despite the unpleasant xenophobia that marks some of the opposing briefs,[4] the United States trademark owners subjected to the inroads of the gray market are American companies, incorporated and domiciled in the United States. In some cases, to be sure, such as that of the named plaintiff Cartier, Inc., the American owner of the United States trademark is a partially or wholly owned subsidiary of a foreign company that owns the identical mark abroad. In many other cases, such as those of the United States automobile manufacturers, Duracell, Procter & Gamble, and Eastman Kodak, the owner of the United States trademark is a United States producer. It either has plants abroad itself or has a foreign subsidiary that manufactures and distributes goods abroad with the same mark, or it authorizes the use of its trademark abroad by an unrelated company. In some cases the foreign plants produce exclusively for foreign markets.

To this point, this statement of background facts would not be disputed. The parties, however, differ on the explanation of and consequences of the gray market. The private petitioners believe that the gray market is a function of foreign manufacturers' discriminating against the United States market in the prices they charge for their goods, and the Government does not disagree. They believe that the intrabrand competition that the gray market produces is a price-reduction boon to American consumers. These respondents believe, on the other hand, that gray market imports are almost always a function of free riding on their marketing and product-service expenditures or of the sale of goods of different quality from those manufactured in or for the United States. They believe that the claims even of immediate price

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[4] *E.g.*, 47th St. Photo Br. 2, 27; K mart Br. 7, 23-24; Progress Trading Co. Br. 2, 8; National Ass'n of Catalog Showroom Merchandisers Br. 4, 6.

benefits to consumers are overblown. They believe, furthermore, that the long-term result of free riding and the sale of goods that differ from those with which the United States trademark is associated will be to depreciate the value of the trademark owner's investment in the goodwill that his trademark represents. The incentive to make the investment will decrease. Thus, the effect of the intrabrand competition that the gray market produces will be a deterrioration of interbrand competition. As this Court has increasingly recognized (p. 39, *infra*), interbrand competition is promoted by vertical marketing arrangements such as are at issue here and is a generator of both price and product-quality benefits for the consumer.

This Court is not asked to decide the empirical and policy questions that divide the two sides in this case. But it should know that the simplistic "lower-prices-for-American-consumers" theme of the opposing briefs is by no means the only way to view the gray market. Congress, if taken at its stated word in Section 526, made a rational decision, not the perverse decision that petitioners suggest, when it enacted an unqualified prohibition of the importation, without the trademark owner's consent, of foreign-made merchandise bearing a United States trademark.[5]

The Economics of the Gray Market

The gray market depends on taking advantage of the promotional, marketing, product-service and other expenditures by which the United States trademark owner tries to enhance the value of its trademark and to

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[5] Sources for the following brief discussion of the economics and consequences of the gray market include the sworn statements described in note 2 above and comments prepared by Lexecon Inc. and submitted on behalf of the respondent Coalition to Preserve the Integrity of American Trademarks in the rulemaking referred to in the Government's brief (p. 44 n.54), in which were also submitted the comments of the Federal Trade Commission on which the Government relies (Br. 4-5, 34 n.41).

promote the sale of its trademarked goods. Such expenditures—on design, advertising, product-launch campaigns, trade show exhibits, training programs, and product service—are heavy for the kinds of products in which there is a gray market.[6] The cost of those activities must be borne by goods distributed through the trademark owner's authorized channels and therefore must be reflected in retail prices paid by consumers for such goods. Gray-market goods are free of that burden.

Gray-market transactions are profitable and are therefore engaged in when the unit cost of transporting trademarked goods to a country is less than the unit cost of the promotional and service activities associated with distribution of the product in that country. The gray market exists whenever and wherever the relationship of transportation costs to promotional, marketing, and product-service costs favors the free rider. It is not unique to the United States.[7]

The private petitioners argue that Japan and the European trading partners of the United States allow gray-market importations. (47th St. Photo Br. 40-42; K mart Br. 43-44.) The argument is irrelevant to whether the Customs Service regulations correctly interpret Section 526. But the petitioners' supporting citations on their face disprove their claim that the gray market derives from price discrimination against the United States. The cases that the petitioners cite, from tribunals of Japan, Switzerland, Austria, the United Kingdom, Germany, the Netherlands, and Sweden, ruling on whether gray-market imports should be forbidden or allowed, are flatly inconsistent with the notion that there

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[6] Statements (n.2, *supra*) of Robert H. Miller ¶ 13, Aaron Altman ¶ 9, Jack M. Abrams ¶¶ 12-18.

[7] *See* Takamatsu, *Parallel Importation of Trademarked Goods: A Comparative Analysis*, 57 Wash. L. Rev. 433 (1982) (noting numerous examples of gray markets in other countries, including Europe and the Far East).

is systematic price discrimination against the United States.[8]

Petitioners make the vague claim that "foreign manufacturers" or "foreign companies" try to sell their products at "higher prices" or "much higher prices" in the United States. (Gov't Br. 4, K mart Br. 6, 47th St. Photo Br. 2.) Petitioners presumably refer to retail prices, but it is not even true that retail prices of goods marketed all over the world are generally higher in the United States. More important, to the extent that retail prices are higher in the United States such prices are not evidence of price discrimination. Higher United States retail prices are just as plausibly, and more rationally, explained by higher costs of distribution, including marketing and product-service.

To discriminate in price against the United States at the relevant point, the initial level of distribution, requires a seller with substantial market power. If a seller lacking market power tried it, his competitors would move quickly to enlarge their shares of the immense and affluent United States market at his expense by underselling him. Most goods in which there is a gray market in the United States are goods in which interbrand competition is so fierce that true price discrimination is inconceivable: cameras, perfumes, and watches are only typical examples.[9]

Differing Qualities of Gray-Market Goods

Gray-market goods, though genuine, are not always identical to the goods manufactured for the United States market. Gray-market health-care, personal-care, and cleaning products and soft drinks and alcoholic beverages

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[8] Indeed, the case of Japan and the LaCoste shirts cited by both petitioners (K mart Br. 44; 47th St. Photo Br. 50) indicates price discrimination *in favor of* the United States and against Japan.

[9] Opium brand perfume, the second ranking perfume in the United States market, has a 4% market share. *Hearings on Gray Market Imports Before the International Trade Subcomm. of the Senate Finance Comm.*, 99th Cong., 2d Sess. 29 (1986).

sometimes contain ingredients different from the ingredients of products legitimately sold under United States trademarks; gray-market watches, mechanical equipment and vehicles may lack United States safety features; gray-market electronic products or cameras may be obsolete models; gray-market television receivers may be set for non-United States frequencies; and many gray-market products are sold with instruction manuals in foreign languages. Further, many gray-market products do not carry the United States warranty of service and maintenance that consumers have come to associate with a particular United States trademark.[10]

Trademark owners thus suffer erosion of their goodwill both because of the gray market's free ride on the marketing expenditures that produce the goodwill and because of customer dissatisfaction with gray-market goods sold under their trademarks.

Proceedings Below

This suit was brought in the district court in early 1984 by the Coalition to Preserve the Integrity of American Trademarks and two of its members, Cartier, Inc., and Charles of the Ritz Group, Ltd. Both the individual plaintiffs and many similarly situated COPIAT members (*see* pp. 10a-11a, *infra*) have been denied the protection of Section 526 for their trademarked goods because of the 1972 Customs Service regulations. They sued for a declaration that the regulations are inconsistent with Section 526 (and with Section 42 of the Lanham Trademark Act) and for injunctive relief.

The district court (Johnson, J.) denied the requested relief because it found the regulations consistent with the statutes. (Gov't Pet. 34a-48a.) The court of appeals, in a unanimous opinion written by Judge Silberman and joined by Judges Mikva and Bork, reversed. It held that the regulations "simply cannot be squared with Section 526 and are thus invalid." (Gov't Pet. 9a.) The court, referring to the framework for decision on review of

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[10] Statements (n.2, *supra*) of Aaron Altman ¶¶ 5-7, Jack W. Abrams ¶ 6.

agency action established by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984), found that "Congress' intent in Section 526 is clear, and thus 'that is the end of the matter.'" (Gov't Pet. 11a.) Alternatively, it held the regulations invalid "because they do not constitute a reasonable interpretation of Section 526." (*Id.*) The court found a clear congressional intent on the face of the statute, which was confirmed by the history of its enactment and reenactment and by contemporaneous agency interpretation and was not undermined by subsequent "vacillating" agency action or by any subsequent congressional action. The court directed the entry of the requested declaratory judgment but withheld injunctive relief. (*Id.* at 32a.) It did not reach the question under Section 42.

Two other federal circuits have considered the validity of the Customs Service's regulations. Neither has upheld the regulations as a correct interpretation of Section 526. In *Vivitar Corp.* v. *United States*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986), the court determined that the regulations did not correctly interpret the statute but sustained them as enforcement guidelines for the Customs Service. The court below rejected this result because "the Customs Service has never purported to justify these regulations as an exercise of enforcement discretion." (Gov't Pet. 31a.) Nevertheless, the Second Circuit, in *Olympus Corp.* v. *United States*, 792 F.2d 315, 320 (2d Cir. 1986), *petition for cert. filed*, No. 86-757 (Nov. 6, 1986), later followed the Federal Circuit in sustaining the regulations only as an exercise of the agency's enforcement discretion. Both the Federal Circuit and the Second Circuit took the view that private remedies afforded by Section 526 against gray-market dealers are available to trademark owners, regardless of corporate affiliation.[11]

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[11] Section 526(c) of the Tariff Act of 1930, 19 U.S.C. § 1526(c) (pp. 1a-2a, *infra*), provides for private remedies against "[a]ny person dealing in" merchandise whose importation is forbidden by Section 526(a).

The Federal Circuit in the *Vivitar* case held that the Court of International Trade had exclusive jurisdiction of that case (which was like this one in respect of the jurisdictional issue) under 28 U.S.C. § 1581. The court below (Gov't Pet. 4a-8a) and the Second Circuit disagreed, finding jurisdiction in their respective district courts under 28 U.S.C. §§ 1331 and 1338(a) and Section 39 of the Lanham Act, 15 U.S.C. § 1121.

SUMMARY OF ARGUMENT

1. This case lies within the traditional trademark jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1338(a) and Section 39 of the Lanham Act. That jurisdiction is not affected, as to this kind of case, by the grant in 28 U.S.C. § 1581 of specialized jurisdiction to the Court of International Trade of certain carefully specified kinds of cases arising under the trade and customs laws. Specifically, Section 526 is not a law providing for an "embargo[] or other quantitative restriction[] on the importation of merchandise" within the meaning of 28 U.S.C. § 1581(i)(3). Nor is it, within the meaning of 28 U.S.C. § 1581(i)(4), a law "providing for . . . administration and enforcement with respect to" matters described elsewhere in Section 1581, including particularly contests of protest denials described in Section 1581(a).

2. Section 526(a) is an uncommonly unambiguous statutory enactment. On its face it protects any United States citizen, individual or corporate, who owns a registered United States trademark against the unconsented-to importation of any goods bearing that same trademark. Given its natural meaning, Section 526(a) condemns the Customs Service regulations purporting to interpret it as hopelessly inconsistent with it and therefore invalid. The regulations make the protection of the statute turn on relationships between trademark owners and deprive it of most of its intended effect. As petitioner 47th Street Photo's unsuccessful effort at textual

analysis shows, the terms of Section 526(a) cannot be made to yield a meaning consistent with the regulations.

3. If the secondary sources that petitioners necessarily rely on are consulted, they disclose no such "clearly expressed legislative intention" as this Court has demanded to persuade it to depart from the terms of a statute. *United States* v. *James*, 106 S. Ct. 3116, 3122 (1986). To the contrary, the breadth of the terms of Section 526 is confirmed by its source in dissatisfaction with the Second Circuit's "universality" doctrine of trademark law, by the 1922 Conference Committee's broad description of its effect and purpose, and even by the 1922 debate on the Senate floor, on which petitioners place their heaviest reliance. That Section 526 broadly wrote the "territoriality" doctrine of trademark protection into law when first enacted in 1922 is confirmed by the understanding manifested by Senators and the entire Congress in rejecting an important amendment to it and reenacting it in 1930.

4. The contemporaneous administrative interpretations of Section 526, in 1923 and 1931, gave no hint of the limitations that were to be ascribed to it by the 1972 Customs Service regulations. After those contemporaneous interpretations, all is confusion. The agency position has been vacillating and unexplained. The present view expressed in the 1972 regulations, which has itself at least once been contradicted, seemingly rests on legislative history and antitrust doctrine (outmoded at that), which are not matters of Customs expertise but are matters within the competence of the judiciary. The agency view is inconsistent with the clearly expressed intent of Congress, found in the statutory words and confirmed by the use of "traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 (1987), and does not represent a reasonable interpretation of the statute.

5. Congress has not acquiesced in and thereby ratified the Customs Service's interpretation of Section 526. Be-

fore 1972, it could not have done so because the interpretation was so uncertain that Congress could not have had the "prolonged and acute awareness" of it that this Court requires. *Bob Jones University* v. *United States*, 461 U.S. 574, 601 (1983). Moreover, Congress rejected proposals to repeal Section 526 or write limitations into it. Since 1972, Congress has taken no action that implies ratification of the position stated in the regulations.

6. The regulations cannot be sustained as guidelines for Customs Service enforcement of Section 526. They have never been represented as anything other than interpretations of the statute. To sustain them on some other ground is contrary to *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943), and to an even more basic rule: if there is discretion to promulgate enforcement guidelines, the discretion is that of the agency and cannot be exercised by a court; the agency has never purported to exercise such discretion here. Nor can the regulations be sustained merely because gray-market importers have relied on them.

ARGUMENT

Section 526(a) of the Tariff Act of 1930 is clear and unambiguous on its face. Given its natural meaning, Section 526(a) is utterly inconsistent with the Customs Service regulations interpreting it. They remove from its coverage important categories of cases that in terms it covers. The secondary sources of enlightenment on the meaning of the statute—legislative history, contemporaneous administrative interpretation, and subsequent congressional action—tend more to confirm than to cast doubt on the natural meaning of Section 526. When Section 526 is given its natural meaning, as confirmed by the use of these traditional tools of statutory construction, Congress is seen to have expressed its clear intent on the point at issue, and there is thus no occasion for deferring to the Customs Service's current interpretation of the statute. In any event, that interpretation would have to be rejected as not reasonably related to the terms of the statute.

The foregoing paragraph outlines the arguments on the merits made in Parts II through VI of the Argument below. First, in Part I, we demonstrate that the district court had jurisdiction of this case under 28 U.S.C. §§ 1331 and 1338(a) and 15 U.S.C. § 1121.

I. JURISDICTION OF THIS CASE LIES IN THE DISTRICT COURT AND NOT IN THE COURT OF INTERNATIONAL TRADE.

This action was brought under both Section 526 of the Tariff Act of 1930 and Section 42 of the Lanham Trademark Act of 1946.[12] Jurisdiction was therefore founded on the general federal question jurisdictional grant, 28 U.S.C. § 1331, the specific grant of jurisdiction to the district courts of actions "arising under any Act of Congress relating to . . . trade-marks," 28 U.S.C. § 1338(a), and the even more specific conferral of jurisdiction on the district courts, by Section 39 of the Lanham Act, 15 U.S.C. § 1121, of all cases arising under that Act. (P. 6a, *infra.*)

The district court and the court of appeals in this case and the district court and the court of appeals in *Olympus Corp.* v. *United States*, *supra*, 792 F.2d at 317-19, held that these statutes conferring jurisdiction on the district courts were not affected by the grant of exclusive jurisdiction of certain trade cases to the Court of International Trade by 28 U.S.C. § 1581. (Pp. 7a-9a,

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[12] The court below did not reach the question under Section 42. (Gov't Pet. 9a.) K mart's statement of the question presented in this Court is broad enough to encompass the Section 42 issue, but it should be left to the court of appeals if there is a remand. This Court held in A. Bourjois & Co. v. Aldridge, 263 U.S. 675 (1923), that the words "copy or simulate" in the predecessor to Section 42 covered genuine trademarks identical to United States trademarks. (P. 25, *infra.*) The Customs Service recognized and gave effect to this holding in 1936. (P. 42, *infra.*) The only question concerning the reach of Section 42 (set forth at K mart Br. 3) is whether, when the Lanham Act was enacted, Congress meant to adopt the single-company-ownership limitation that was also written into the regulation governing the predecessor to Section 42. (*Id.*) That is an issue that justifies full briefing.

infra.) By contrast, the Federal Circuit, in *Vivitar Corp.* v. *United States, supra*, 761 F.2d at 1557-60, held that the Court of International Trade had exclusive jurisdiction of a similar action under two subparts of Section 1581. 47th Street Photo asserts here that the Federal Circuit was right. It was not. Neither of the subparts of Section 1581 relied on by the courts in *Vivitar* and now by 47th Street Photo reaches this case.

A. This Action Is Not Within the Court of International Trade's "Embargo" Jurisdiction.

Section 1581(i)(3) of Title 28 gives the Court of International Trade exclusive jurisdiction over any action against the United States that arises out of a law providing for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 47th Street Photo contends that the case is within that branch of the Court of International Trade's jurisdiction. (Br. 10-17.)

The simple answer to the contention is that Section 526 does not impose an embargo or other quantitative restriction. An embargo, as that term is commonly understood, is a limitation on imports imposed by the Administration for reasons of international trade policy. *E.g., American Association of Exporters and Importers* v. *United States*, 751 F.2d 1239 (Fed. Cir. 1985). Section 526 does not impose any quantitative restrictions on the entry of merchandise nor is it predicated on international trade policy concerns. Instead, it implements private domestic trademark rights vested in United States corporations that own United States trademarks.

The court below stated that "Section 526 confers an absolute, unqualified property right upon American companies that own registered trademarks." (Gov't Pet. 15a-16a.) The lawfulness of an importation under Section 526 depends on whether the owner of the United States trademark has consented to the entry of the trademarked goods. That feature of the statute, em-

phasizing that it exists to protect private rights, is completely at odds with the concept of embargoes and quotas, which do not enforce private rights and do not delegate to private parties the right to determine whether particular goods may enter. Nor are embargoes commonly thought of as avoidable if only the importer does such a simple thing as removing the trademark from the otherwise embargoed goods. *See Sturges* v. *Clark D. Pease, Inc.*, 48 F.2d 1035, 1038-39 (2d Cir. 1931).

The court below looked at the matter from a slightly different angle and came to the same correct conclusion. It said that "the structure of the statute belies any expansive reading of the term 'embargo'" because the other categories of cases listed in Section 1581(i) "all specifically deal with traditional Customs matters (and thus lie within the Court of International Trade's expertise)." (Gov't Pet. 8a.) The court noted the listing of cases arising under laws providing for "revenue from imports or tonnage," § 1581(i)(1), and for "tariffs, duties, fees, or other taxes on the importation of merchandise," § 1581(i)(2). (Gov't Pet. 8a.) The court thus did not do what 47th Street Photo asserts it did (Br. 11-12): carve out a further exception to Section 1581(i)(3) to add to the express statutory exception for public health and safety embargoes. The court created no new exception but held simply that the effect of Section 526 is not to impose a public-policy embargo. The statute's waivable prohibition of the entry of goods if they are marked in a certain way is not like "quotas and embargoes arising out of trade policy, the sort of measures that have traditionally limited the importation of shoes, textiles, automobiles, and the like." (Gov't Pet. 8a.)[13]

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[13] Moreover, if Section 526 is held to impose an embargo, so must Section 42 of the Lanham Act. Despite the suggestion of the court below that 28 U.S.C. § 1581 cuts into Section 39 of the Lanham Act as well as into the district-court jurisdictional provisions of Title 28 (Gov't Pet. 5a n.2), it seems unlikely that Congress meant to

47th Street Photo discusses at length the history of Section 1581(i), the so-called residual subsection of the Customs Court's jurisdictional statute. (Br. 12-17.) None of that history, it should be said, deals specifically with the meaning of the term "embargo." 47th Street Photo contends in particular, based on its discussion of the history, that a policy of uniformity underlying the Customs Court Act of 1980 would be transgressed if the district courts adjudicated claims such as the one involved in this case. But that congressional concern with uniform and consistent application of certain trade laws was intended to implement the constitutional mandate that "all Duties, Imposts and Excises shall be uniform throughout the United States . . . ." *See* U.S. Const. Art. I, § 8[1]; H.R. Rep. No. 1235, 96th Cong., 2d Sess. 29 (1980). That constitutional command is in no way relevant to the issues raised here.

Moreover, uniformity would not be served by granting exclusive jurisdiction to the Court of International Trade of this kind of case, because the district courts and not the Court of International Trade admittedly have jurisdiction over actions brought under Section 526(c) against private parties dealing in merchandise whose presence in this country is rendered unlawful by Section 526(a). *See Vivitar, supra*, 761 F.2d at 1560; *Epocha Distributors* v. *Quality King Distributors*, No. 86-2270 (E.D.N.Y. Jan. 20, 1987). Appeal of such cases is to the regional circuits and not the Federal Circuit. 28 U.S.C. § 1295 (a)(1).

B. Actions of This Type Do Not Lie Within the Court of International Trade's "Protest" Jurisdiction or Any Supposed "Corollary" Thereof.

The Federal Circuit held in *Vivitar* that the Court of International Trade has exclusive jurisdiction over actions of this type "as a corollary to protest jurisdiction under 28 U.S.C. § 1581(a)." 761 F.2d at 1560. 47th Street Photo echoes that assertion. (Br. 17-18.)

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impair the district courts' otherwise exclusive jurisdiction of Lanham Act actions.

The "protest jurisdiction" of Section 1581(a) to which the Federal Circuit and petitioner refer gives the Court of International Trade "exclusive jurisdiction of any civil action commenced to contest the denial of a protest" under a certain provision of the Tariff Act. A protest is an administrative remedy available to challenge specified decisions by Customs officers, including a decision of a Customs officer ordering "the exclusion of merchandise from entry . . . under any provision of the customs laws." 19 U.S.C. § 1514(a)(4). But there is no statutory provision creating a protest remedy when merchandise is *not* excluded by a Customs officer, as here. Thus, a decision of the Customs Service permitting the importation of certain trademarked goods under Section 526 is not a protestable action.

Nonetheless, the Federal Circuit held in *Vivitar* and 47th Street Photo argues here that, by virtue of Section 1581(i)(4), an action against the Government challenging the Customs Service's regulations permitting the importation of gray-market goods falls within the exclusive jurisdiction of the Court of International Trade as a "corollary" to the protest-review jurisdiction that is clearly unavailable under Section 1581(a). Section 1581(i)(4) gives the Court of International Trade exclusive jurisdiction over any action gainst the Government that "arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to" in subsection 1581(a), among others. As the court below observed, the "matter" referred to in Section 1581(a) is "the denial of protests." (*See* Gov't Pet. 7a.)

The discussion in the *Vivitar* opinions of why Section 526 is a "law of the United States providing for . . . administration and enforcement with respect to" denial of a protest is not edifying. *See* 585 F. Supp. 1419, 1424-25 (C.I.T. 1984); 761 F.2d at 1560. 47th Street Photo scarcely does better. It says, quite incorrectly, that the court below would limit the Court of International

Trade's jurisdiction "to the protests themselves." (Br. 18.) Obviously, Section 1581(i)(4) adds something. What it seems on its face to add, and what the court below said it added, is "jurisdiction over cases challenging the *procedures*—that is, the 'administration and enforcement'—generally governing such protests." (Gov't Pet. 7a; emphasis in original.)

47th Street Photo says that Section 1581(i)(4) gives the Court of International Trade jurisdiction over "statutes and regulations that are involved in . . . protests." (Br. 18.) What this means is unclear, unless it means that any suit against the Government arising out of any statute that might be authority for excluding goods is within the jurisdiction of the Court of International Trade. But that cannot be. Congress deliberately did not give the Court of International Trade jurisdiction of all customs cases or all trade cases. It considered doing so but wrote the detailed provisions of Section 1581 instead.

An earlier version of Section 1581(i) would have given the court exclusive jurisdiction over any action against the United States or an agency or officer arising from an import transaction and broadly involving "the Tariff Act of 1930" or any one of several other enumerated acts. *See* H.R. 6394, 96th Cong., 2d Sess. § 201(a) (1980). That earlier version was rejected precisely because it would have continued to blur the jurisdictional division between the Court of International Trade and the district courts. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 33 (1980). Instead, Congress chose to enumerate precisely the *matters* over which exclusive jurisdiction is conferred on the Court of International Trade, and it made clear its intent that only "suits of the *type specified*"—not all suits involving certain broad acts—are properly pursued in that court. *Id.* at 47 (emphasis added).

Section 1581 does not diminish the district courts' undoubted jurisdiction of trademark cases by confining this kind of case to the Court of International Trade.

II. THE LANGUAGE OF SECTION 526 IS CLEAR AND SHOULD BE ACCORDED ITS NATURAL MEANING.

This Court does not often deal with statutes as straightforward and unambiguous as Section 526(a) of the Tariff Act of 1930, 19 U.S.C. § 1526(a). (Pp. 1a-3a, *infra.*) Section 526(a) states simply that goods of foreign manufacture bearing certain trademarks may not enter this country. The proscribed trademark on the imported goods is one owned by a United States citizen or a corporation "created or organized within" the United States. The trademark must have been registered with the Patent and Trademark Office by a person domiciled in the United States. A copy of the certificate of registration must have been filed with the Secretary of the Treasury (by delegation the Customs Service). The owner of the trademark may consent in writing to the entry of goods bearing its trademark, but it may also withhold its consent. There is an exception for a limited amount of merchandise brought in by travelers for their own consumption or use, but there is no other exception.

A. Because the Meaning of Section 526 Is Clear from the Words in Which Congress Expressed Itself, It Should Be Given Effect in Accordance with Those Words.

In *Amoco Production Co.* v. *Village of Gambell*, 107 S. Ct. 1396 (1987), this Court restated in the strongest terms the primacy of statutory language taken at its ordinary face value as a guide to congressional purpose. The Court quoted from *United States* v. *Locke*, 471 U.S. 84, 95 (1985), a statement that "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" 107 S. Ct. at 1406.[14] Earlier in this 1986 Term, the Court

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[14] The internal quotation is from Richards v. United States, 369 U.S. 1, 9 (1962).

spoke of a "strong presumption that Congress expresses its intent through the language it chooses." *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 n.12 (1987). "If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 368 (1986) (citations omitted); *see also Burlington Northern R.R.* v. *Oklahoma Tax Commission*, No. 86-337 (April 28, 1987), slip op. at 5-6.

Judged against the ordinary meaning of the words of Section 526(a), the Customs Service's regulations (pp. 4a-5a, *infra*) are not interpretation or construction but wholesale reconstruction. The regulations are like the rejected view of the respondents in the *Burlington Northern* case as to the meaning of the statute empowering federal courts to act against discriminatory property taxes on railroads: to sustain them "would require amendment rather than construction of the statute." *Burlington Northern*, *supra*, slip op. at 7. The regulations deny the applicability of the statute to the cases where (1) the United States trademark and the identical foreign trademark are owned by the same company, (2) the owners of the United States and the foreign trademarks are parent and subsidiary or otherwise subject to common ownership or control, and (3) the foreign trademark was applied under the authorization of the United States trademark owner. 19 C.F.R. § 133.21(c)(1)-(3). The Customs Service has effectively rewritten the statute in such a way as to deprive it of most of its coverage.

B. There Is No Ambiguity in Section 526 That Requires Reference to Secondary Sources.

None of the petitioners has shown how the words of Section 526 can be narrowed to make them accord with the regulations. Only one has tried. Unlike the Government, which concedes that the statute seems not literally to allow of the gaping hole the Customs Service regulations tear in it (Br. 11) and K mart (Br. 15), 47th Street Photo attempts a textual analysis. It asks rhetor-

ically the meaning of (1) "owned," as used in Section 526 to prescribe that a trademark must be owned by a citizen of the United States or a "corporation . . . created or organized within . . . the United States," and (2) "domiciled," as used to prescribe that a trademark must be registered by a person domiciled in the United States. (Br. 19.) Its surprising answer is that—to take a concrete example—because some Chevrolets are manufactured abroad by a General Motors subsidiary, General Motors either does not "own" its Chevrolet trademark or is not "domiciled" in the United States and thus is outside Section 526. (*Id.* at 20-22.) There is no other way to understand 47th Street Photo's concluding remark that "[t]he statutory terms 'owned' and 'domiciled' should . . . be read as limiting Section 526 to truly independent American companies that are unaffiliated with foreign producers." (*Id.* at 22.)

This novel attempt at textual analysis would be coherent, though not persuasive, if limited to the case of the American subsidiary that is a distributor for a foreign manufacturing parent. But it cannot be so limited because 47th Street Photo has to cut the cloth of its argument to fit the full contours of the Customs Service's regulations. The regulations exclude Kodak, Procter & Gamble, Ford, and Johnson & Johnson as well as General Motors from the protection of Section 526 just as much as they do the United States distributors of Japanese cameras and watches on which petitioners would like the Court to concentrate. The idea that Congress intended that American manufacturing companies such as those just named should not be considered the owners of their United States trademarks (or not domiciled in the United States) is simply bizarre.

Even limited to the case of a United States distributor subsidiary of a foreign manufacturing parent, 47th Street Photo's textual analysis is unpersuasive. The obvious way for Congress to have excluded foreign-owned subsidiaries from the protection of Section 526 would have been by a

constraining definition of the kind of corporate citizen that could qualify as an owner of a trademark and domiciliary of the United States. Congress, however, wrote no constraining definition of corporate citizenship. When Congress has in fact wanted to restrict the foreign affiliations of the corporate equivalent of an individual citizen, it has known how to do so. In such cases it demands not only that the corporation be created or organized "within the United States," *i.e.*, under the laws of one of the states, but also that United States citizens own a specified percentage of voting stock and hold a specified proportion of seats on the board of directors. *E.g.*, Federal Aviation Act § 101(16), 49 U.S.C. § 1301(16); Foreign Agents Registration Act, 18 U.S.C. § 1386(A); Communications Act of 1934, 47 U.S.C. § 310(a)(4)-(5). Congress pointedly did not do that here. (*See* p. 31, *infra.*)

As the Government reminds us (Br. 12), this Court has said that a court may be persuaded that "Congress did not intend words of common meaning to have their literal effect." *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). But that unquestionable proposition is irrelevant when there is no uncommon meaning that the words of a statute can be made to bear. Nor is this such a case as *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 460 (1892) (Gov't Br. 12 n.14), in which the Court considered itself justified in ignoring an omission from a statute because giving it effect yielded an "absurd result." The statute here, construed according to its terms, yields a perfectly rational result, as we have seen. Furthermore, what the Customs Service regulations do is not to ignore some particular term of the statute in a particular absurd application but to rewrite the statute altogether. Not even *Church of the Holy Trinity* is authority for that treatment of a statute.[15]

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[15] Moreover, this Court has cautioned that the *Church of the Holy Trinity* rule is to be applied only rarely. *E.g.*, United States v. Rutherford, 442 U.S. 544, 555 (1979).

III. THE LEGISLATIVE HISTORY OF SECTION 526 CONFIRMS ITS NATURAL, BROAD MEANING.

Although this Court has said that, when it finds "the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances,'" [16] we turn to a discussion of secondary sources, including first the legislative history of Section 526, because that is where the arguments of petitioners to which we are responding necessarily take them. They cannot cope with the clarity of the natural meaning of the statute.

The legislative history does not avail them. It does not disclose a "clearly expressed legislative intention," *United States* v. *James*, 106 S. Ct. 3116, 3122 (1986), running counter to the plain language of the statute, which is what the Court indicated in *Cardoza-Fonseca*, *supra*, 107 S. Ct. at 1213 n.12, it takes to "require us to question the strong presumption that Congress expresses its intent through the language it chooses." To the contrary. The court below was plainly right when it concluded from its review of the circumstances of the enactment of Section 526 and its history "that the statute embodies a purpose as sweeping as the terms its drafters employed." (Gov't Pet. 12a.)

It is well to have in mind in considering the legislative history how dependent petitioners are on secondary sources and on one part of the legislative history in particular. Early in petitioners' arguments the words of the statute are forgotten. What matters to them, ultimately, is what was said on the Senate floor in a 10-minute debate in 1922. Congress could have used any form of words, and petitioners would urge this Court to ignore them and instead to construct a statute from what they take Senators to have said in that brief and not very well-informed debate.

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[16] Garcia v. United States, 469 U.S. 70, 75 (1984), quoting "rare and exceptional circumstances" from TVA v. Hill, 437 U.S. 153, 187 n.33 (1978), which in turn quoted Crooks v. Harrelson, 282 U.S. 55, 60 (1930). *See also* Burlington Northern R.R. v. Oklahoma Tax Comm'n, No. 86-337 (April 28, 1987), slip op. at 5-6.

A. The Historical Background of Section 526 Confirms the Breadth of Its Meaning.

The broad meaning of Section 526 is confirmed by the historical context in which it was enacted. The context is described succinctly in the opinion of the court of appeals. (Gov't Pet. 12a-14a.) In brief: In 1921 the Court of Appeals for the Second Circuit decided *A. Bourjois & Co.* v. *Katzel*, 275 F. 539, a case that was contentious as soon as it was decided. The plaintiff was a United States company that had purchased from a French manufacturer of face powder that firm's United States business, including its United States trademark, and thereafter imported the manufacturing company's Java face powder and distributed it in this country. The defendant was a retail druggist who had bought some of the same powder in France and imported it and sold it in competition with the Bourjois company under the nearly identical French trademark. In accordance with a view of trademark law that it had espoused for some years [17] (and that no other federal court had contradicted), the Second Circuit reversed a district court's grant of an injunction against the claimed trademark infringement.

Over the prescient dissent of Judge Hough,[18] the court of appeals ruled that, "[i]f the goods sold are the genuine goods covered by the trade-mark, the rights of the owner of the trade-mark are not infringed." 275 F. at 543. Both this Court, *see id.* at 544, and the Congress were importuned to do something about the Second Circuit's *Katzel* decision. This Court granted certiorari, 257 U.S. 630 (1921), and reversed the Second Circuit in an opinion by Justice Holmes. The Court held that the im-

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[17] *See, e.g.*, Fred Gretsch Mfg. Co. v. Schoening, 238 F. 780 (2d Cir. 1916).

[18] He wrote that his colleagues of the majority seemed to him in their decision "to lean the wrong way" in resolving what he thought was the unsettled question "whether a trade-mark is to be primarily regarded as protecting the trade-mark owner's business from a species of unfair competition, or protecting the public from imitations." 275 F. at 543.

ported French powder bearing a mark identical to the United States mark owned by the Bourjois company infringed that mark. *A. Bourjois & Co.* v. *Katzel*, 260 U.S. 689 (1923).

As noted in the opinion below, the Court thereby adopted what is known as the "territoriality" theory of trademarks. (Gov't Pet. 13a.) On this theory, the protection of trademarks is a function of the laws of a particular sovereign, so that it is wrong to speak, as the Second Circuit had in conformity with its rejected "universality" theory, of the French goods bearing the French trademark as "genuine goods covered by *the* trade-mark." 275 F. at 543 (emphasis added).

> "It is said that the trade mark here is that of the French house and truly indicates the origin of the goods. But that is not accurate. It is the trade mark of the plaintiff only in the United States and indicates in law . . . that the goods come from the plaintiff although not made by it." 260 U.S. at 692.

Later that same year, the Court held on the authority of *Katzel* that goods bearing a foreign trademark identical to a mark owned by a United States company should be excluded from importation by the Customs Service, under Section 27 of the Trade-mark Act of 1905, which forbade the importation of goods bearing a trademark that "shall copy or simulate" a registered United States trademark. *A. Bourjois & Co.* v. *Aldridge*, 263 U.S. 675 (1923), *answering questions certified at* 292 F. 1013 (2d Cir. 1922). (*See* Gov't Pet. 14a n.10.)

B. The 1922 Legislative History Further Confirms the Breadth of the Statutory Terms.

Congress reacted to the clamor that followed the Second Circuit's decision in *Katzel* before this Court reversed the decision. The bill that became the Tariff Act of 1922 was pending. Section 526 was proposed as an amendment to that bill on the Senate floor, adopted after the 10-minute debate that the petitioners rely on so heavily, amended in conference, and passed as part of the Tariff

Act. By Section 526 Congress anticipated this Court in, as the court below put it, rejecting "without qualification the legal theory underlying the Second Circuit's opinion in *Katzel*—the view that a trademark genuine in a foreign country is necessarily genuine here as well"—and in writing "the alternative 'territoriality' approach into law." (Gov't Pet. 14a-15a.)

Congress' "sweeping rejection of prevailing legal doctrine" (*id.* at 15a), in favor of territorial protection of a United States-owned and registered trademark, is well described in the Conference Committee's report:

> "A recent decision of the circuit court of appeals holds that existing law does not prevent the importation of merchandise bearing the same trade-mark as merchandise of the United States, if the imported merchandise is genuine and if there is no fraud upon the public. The Senate amendment makes such importation unlawful without the consent of the owner of the American trade-mark, in order to protect the American manufacturer or producer . . . ." H.R. Rep. No. 1223, 67th Cong., 2d Sess. 158 (1922).

The first sentence of this part of the conferees' report begins with a statement of the *Katzel* rule of law at the highest level of generality. *Katzel*, it is plain from the committee's statement, is not being overruled on its narrow facts.[19] There is no reference to the appealing equities of the Bourjois company's case: the fact that it had bought the United States trademark and had no other relationship with the French source of the competing goods than that of supplier and distributor. Instead, Bourjois's case is made the vehicle for stating broadly the

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[19] The court below pointed out that the committee mistakenly described *Katzel* as an importation case rather than an infringement case. (Gov't Pet. 15a.) For some reason, the Government feels a need to dispute the court on this point (Br. 27), which had nothing to do with the court's assessment of the significance of the committee's report. Moreover, the distinction the Government would draw between trademark law and import law (*id.* at 27-28) is empty. The territoriality of trademark protection is an issue only when goods are imported.

present state of the law, even emphasizing the equitable policy basis of the doctrine of universality—"the imported merchandise is genuine and . . . there is no fraud upon the public." The second sentence states flatly that Section 526 would make unlawful, without the United States trademark owner's consent, the importation of goods that the universality doctrine would allow—the importation of genuine goods bearing the same trademark as merchandise sold in the United States under the United States trademark.

The reference in the report to the purpose of protecting American "producers and manufacturers" (of which petitioners make a good deal) cannot be taken as an implied limitation on the scope of the words used to carry out the purpose. The plaintiff in *Katzel* was neither a producer nor a manufacturer but only a distributor of the French powder.[20] Other plainly intended beneficiaries of Section 526—for example, the "American citizens [who] have purchased the trade-mark of the Hunyadi Janos water," 62 Cong. Rec. 11,603 (1922)—were not producers or manufacturers. Moreover, as we are bound to reiterate, many undoubted American producers and manufacturers are denied the protection of Section 526 by the Customs Service's regulations.

Petitioners, by the attention they pay to the Conference Committee, implicitly recognize that, as this Court has said, committee reports are the "authoritative source for finding the Legislature's intent," *Garcia* v. *United States*, 469 U.S. 70, 76 (1984), and that in this case

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[20] K mart (Br. 21-22) describes certain packaging activities of the plaintiff in *Katzel* in a vain attempt to make it a "manufacturer" of the imported powder that it distributed. But the fact that Bourjois packaged the powder in the United States does not make it a manufacturer. See 275 F. at 539 and Justice Holmes' remark (p. 25, *supra*) that the goods were "not made by" the plaintiff. Moreover, many United States companies with foreign affiliates undertake the kinds of packaging and marketing activities of the plaintiff in *Katzel*, yet are denied the protection of Section 526 by the Customs Service's regulations.

there is no other relevant committee report. However, petitioners rely principally on the far less trustworthy Senate floor debate. (Gov't Br. 17-25, 47th Street Photo Br. 26-29, K mart Br. 19-20.) The debate persuades the Government that Congress had no intention on the point at issue in this case. (Br. 22-24.) 47th Street Photo (Br. 29) is almost as cautious, persuaded by the legislative history only that "a narrow reading of Section 526 makes eminently good sense." K mart (Br. 17) finds a "clear picture of the purpose behind Section 526," which demonstrates "the reasonableness of the Customs Service regulation." Neither the modest claims nor the bolder one are well-founded. The court below thought that the Senate debate, "considered as a whole," reinforced its "conclusion that Section 526 confers an absolute, unqualified property right upon American companies that own registered trademarks." (Gov't Pet. 15a-16a.) We point out reasons why the court below was correct in finding in the debate reinforcement for that conclusion.

1. The proposed amendment that became Section 526 was seen by opponents as another in a series of concessions to certain business interests—"written by a lawyer well known in the precincts of the Capitol" and brought in by the Finance Committee "the other morning after their midnight session," and therefore "fairly classified now as one of the midnight amendments, like the 'midnight judges' of the John Adams administration"; "another diamond-studded link in the chain with which the Committee on Finance seems bound to adorn the buxom bosom of certain interests in this country." 62 Cong. Rec. 11,602 (1922). As the court below observed, faced with that kind of reaction, sponsors of the amendment naturally tried "to understate its significance by focusing on its most notorious targets." (Gov't Pet. 17a.) So focusing, they went so far as to blur one of the targets, stating that all the amendment did was to "prevent fraud" and imputing to the *Katzel* case a species of fraud not present in it. Sponsors indicated incorrectly that the French powder maker that had sold its United States trademark

to the Bourjois company itself imported the competing Java powder.[21] 62 Cong. Rec. 11,603, 11,605. The assertions in the debate that Section 526 concerned only fraud must, therefore, be taken at a substantial discount.

2. The most dogged opponent of Section 526 was Senator Lenroot. He raised a point that the sponsors had apparently not considered when he wondered what would happen if an American citizen—perhaps a Wisconsin constitutent of his—went to Toronto and, while there, purchased a sack of Wonder Flour, an American product, and tried to bring it back into this country. "Am I correct," he asked, that "[u]nder this section that merchandise must be confiscated." *Id.* at 11,603. A sponsor, Senator Sutherland (who had just assured the Senate that the only aim of the amendment was "to prevent . . . a palpable fraud"), responded concerning this case of something very far from fraud: "And it ought to be [confiscated]." Senator Lenroot exploited the opening this response gave him, embellishing his description of the plight of the American citizen who must suffer confiscation of the fine American product he had bought in Canada in preference to a sack of Canadian flour "[u]nless he has the written permission of the maker of that flour." Senator McCumber, a sponsor with more political sense than Senator Sutherland, saw the point and offered an amendment requiring that goods to be excluded be of foreign manufacture. *Id.* at 11,604.

If the Customs Service's regulations now in force correctly reflected the intent of the sponsors of Section 526, Senators Sutherland and McCumber need not have been

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[21] Not even the Second Circuit would have withheld protection in such a case. *See* A. Bourjois & Co. v. Katzel, 275 F. 539, 540 (2d Cir. 1921); Apollinaris Co. v. Scherer, 27 F. 18, 20-21 (C.C.S.D.N.Y. 1886). A statute limited to what were represented on the floor to be the facts of *Katzel* would therefore have had very little substance. The Government nevertheless thinks it no more than "reasonable" that the Customs Service extends protection beyond the misstated facts of *Katzel* to the actual facts of third-party importation. (Br. 33 n.39.)

embarrassed by Senator Lenroot's questions at all. They would have answered that the amendment would not apply to his putative constituent because the trademark had been placed on the sack of Wonder Flour by the United States owner of the Wonder Flour trademark. As the court below concluded, neither Senator made that response because no such limitation was expressed in the amendment they were sponsoring or intended by it. (*See* Gov't Pet. 17a.)

3. Finally, Senator Edge asked whether a foreign manufacturer could, through an agent in this country, register United States trademarks and then control the distribution of goods bearing those trademarks that were imported into this country. Senator McCumber answered that a foreign manufacturer would not be able so to use agents "because there must be one domiciled in this country who is the owner of the trademark . . . ." 62 Cong. Rec. at 11,605. Senator Lenroot pressed the point with Senator McCumber, using as a hypothetical example the foreign manufacturer of the well-known Pears' soap registering its trademark through a domiciliary agent. The colloquy, which is recorded in the opinion below (Gov't Pet. 18a-19a), ended without Senator Lenroot's getting a definitive answer to his question (which is a branch of the question presented in this case). But Senator McCumber did not deny what Senator Lenroot was critically implying about the reach of the statute by his questions and what he actually affirmed by his final unanswered question. (*Id.*) Furthermore, Senator McCumber in his answer to Senator Lenroot's next-to-last question seemed clearly to distinguish the case of a United States corporation that owned the trademark—"suppose the trade-mark is owned exclusively by an American firm or corporation" —from that of a foreigner "having a trade-mark and registering that trade-mark in the United States, and selling the goods in the United States through an agency"; that latter case, "of course, would not be affected by this provision." (*Id.* at 18a.)

Senator McCumber may have misspoken in answering Senator Edge's question about the foreign manufacturer's use of an American agent. As the amendment then read, it required only that the trademark be registered by a domiciliary. The conferees added the requirement that a trademark be owned by a "citizen of, or . . . a corporation or association created or organized within, the United States." The Conference Committee report noted this amendment to the amendment. H.R. Rep. No. 1223, 67th Cong., 2d Sess. 158 (1922). Thus, the accuracy of Senator McCumber's answer was nailed down explicitly. However, though Senator Lenroot pointedly raised the issue of the treatment of a corporation created within the United States acting as agent or distributor for a foreign parent, Congress went no further. As the court of appeals said, the "reasonable inference" is that Congress "consciously drew the line at American companies, and did not adopt distinctions among different categories of American companies." (Gov't Pet. 19a.)

In the first case in which Section 526 was construed, an argument that it should be limited in its application because of its source in the desire of Congress to overrule *Katzel* was made and rejected. *Sturges* v. *Clark D. Pease, Inc.*, 48 F.2d 1035 (2d Cir. 1931). An American traveling in Europe purchased in Paris a second-hand Hispano-Suiza, a luxury automobile of the time bearing the trademark "H-S," which was owned and registered in the United States by a distributor. The new owner of the car asserted that the term "merchandise" in the statute did not encompass goods imported for personal use and consumption—that such importations were too far removed from the commercial context of *Katzel* to be covered by the statute. For a distinguished panel (including Judges Learned Hand and Swan), Judge Augustus Hand wrote that his court's *Katzel* decision "doubtless brought about the legislation by Congress," and that, if the Supreme Court had reversed the decision before the Tariff Act was enacted, the "provisions in question would not have been enacted at all." *Id.* at 1037. Then he

stated: "But this fact does not settle the scope of the act." What the court referred to as "this drastic statute" had a scope, defined by its words, that went beyond its *Katzel* source.[22]

C. The Reenactment of Section 526 in 1930 Confirms the Congressional Intent That the Words of the Statute Should Be Given Their Natural Meaning.

That Congress as well as the court then most intimately familiar with the matter understood that Section 526 had a scope not limited by its *Katzel* source was demonstrated at about the same time as *Sturges* was decided. In 1930, Section 526, which had been enacted as a section of the Tariff Act of 1922, was repealed and reenacted as Section 526 of the Tariff Act of 1930, the Smoot-Hawley Tariff Act. 46 Stat. 741. The House passed a tariff bill that would have reenacted Section 526 without change. The Senate Finance Committee, however, recommended to the Senate that it remove from Section 526 the clause that allows the entry of otherwise excludable trademarked goods if the United States trademark owner consents in writing. The committee thought it reasonable "to require, so far as practicable, that . . . the holder of the trade-mark shall manufacture his goods in the United States" in exchange for the benefit of the "monopoly in the use of the mark" conferred by United States laws. S. Rep. No. 37, 71st Cong., 1st Sess. 75 (1929). The target of the amendment was obviously runaway plants, the purpose to preserve American jobs. A manufacturer would not build a plant abroad if he did not think he could import trademarked goods produced in it. The amendment would have simply taken Section 526 as it was and made no change other than to strike the final clause: "unless written consent of the owner of such trade-mark was produced at the time of making entry." 71 Cong. Rec. 3871 (1929).

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[22] *See also Vivitar, supra,* 761 F.2d at 1565. Judge Leval reached the same conclusion in Osawa & Co. v. B&H Photo, 589 F. Supp. 1163, 1175 (S.D.N.Y. 1984).

The debate on this proposal in the Senate extended over two days. *Id.* at 3871-76 (Sept. 23, 1929), 3889-906 (Sept. 24, 1929). The most vigorous proponent of the amendment was Senator Reed of Pennsylvania. He spoke of American companies, including General Motors and some Massachusetts shoe factories, that had established overseas plants and could import trademarked foreign-manufactured goods produced there because of the consent clause. *Id.* at 3873. He clearly did not think that, because the trademarks on the goods manufactured in those foreign plants were owned by the same companies that owned the United States trademarks, the goods could be imported regardless of the trademark owner's consent. If he had, he would have known his amendment was pointless.

The Senate, agreeing that American jobs should be preserved, voted with its committee to strike the consent clause from Section 526. *Id.* at 3906. The Conference Committee, however, rejected the Senate's amendment and restored the consent clause. *See* S. Doc. No. 138, 71st Cong., 2d Sess. 1 (1930). Section 526 then was passed by both houses in its 1922 form as Section 526 of the Smoot-Hawley Tariff Act.

The assumption underlying all of this congressional action—the Finance Committee recommendation, the two-day Senate debate, the Senate vote, and the consideration and rejection of the Senate position by the conferees and finally by the Congress—was necessarily that Section 526 applies when both the United States trademark and the identical mark on the merchandise of foreign manufacture are owned by the same company. Not a Senator, so far as appears from the recorded history, suggested the possibility that his colleagues were debating emptily because the statute they were talking about amending did not affect situations in which the United States trademark owner affixed the identical mark abroad.

There is no way to explain away the significance of this 1929-30 history of the reenactment of Section 526. The Government tries (Br. 25-26, 29-30), but what it says makes no sense. It says that what was proposed in the Senate was "not simply an amendment of Section 526; it was an enactment of new legislation, under the same section number, for a completely different purpose." (Br. 29.) But, as we have seen, the Finance Committee's proposal was an amendment that took the existing Section 526 as it was and merely deleted the consent clause.

Senator Reed, the chief proponent, had voted for Section 526 in 1922. 62 Cong. Rec. 11,605 (1922). The Government cannot mean that he understood that Section 526 of the 1922 Act, in the enactment of which he had participated, did not apply to the case he was talking about. If he had so understood, then even on the Government's strange theory of shifting meanings he would surely have said so and, for safety's sake, said further that the words of the statute would have to be endowed with a new meaning if his amendment were adopted. Only thus could he be sure that Customs Service regulation writers had the cue they would need to write regulations that would apply the new statute "in accordance with the legislature's intent" (Gov't Br. 30). On the other hand, if Senator Reed and other Senators who had participated in the 1922 vote on Section 526 (23 of whom were still sitting in 1929) did not understand the limitations of the existing Section 526, it is hard to know who *is* supposed to have understood them in 1929.

There is, finally, the matter of Senator Reed's grammatical lapse. All three petitioners [23] join in urging that Senator Reed, during a debate in which he was arguing that the elimination of the consent clause would inhibit runaway plants, expressed the view that the existing statute did not give the owner of such a plant the right

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[23] Gov't Br. 30 & n.36, K mart Br. 26, 47th Street Photo Br. 29 n.19.

to withhold his consent to importation and exclude his goods if the trademark was affixed abroad with his consent. What Senator Reed said was:

> "At the present time the tariff laws forbid the importation of an article bearing a trade-mark registered in America unless the owner of that trademark consents in writing to the importation. Obviously the purpose of that provision is to protect the American owner of the trade-mark against importations of articles which have been stamped with his mark without his consent." 71 Cong. Rec. 3873 (1929).

Senator Reed must have intended "without his consent" to modify "importations of articles" and not, as would seem to be the case grammatically, "stamped with his mark." [24] The debate concerned consent to importation, and Senator Reed talked about "consent." He would probably have used the term "authorized" if he had meant to refer to the use of the owner's trademark and not permission to import. That is the term the Customs Service used 40 years after Senator Reed's remark when it finally caught up with this interpretation of Section 526. (P. 48, *infra.*) The Government says that the logical interpretation of the Senator's remark, adopted by the court below (Gov't Pet. 20a n.12), reduces it "to an ungrammatical tautology." (Br. 30 n.36.) Ungrammatical perhaps, but it is no tautology or even a substantial

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[24] How petitioners profit from Senator Reed's statement even if it is read illogically is not clear. If he is taken to have been referring to affixing foreign trademarks without the United States trademark owner's consent and if he was thereby stating exhaustively the purpose of the statute, the statute's coverage of petitioners' paradigm case of the United States subsidiary distributor for a foreign manufacturer would not be affected. Even in petitioners' strange lexicon, that distributor cannot be said to be giving consent to the use by the parent manufacturer of the manufacturer's own trademark on goods manufactured for markets other than the United States.

redundancy to describe a statute in one sentence and state its purpose in somewhat the same words in the next. That sort of Senatorial rhetoric is much more likely than a novel use of the word "consent" in one sentence when a very specific kind of consent was the whole subject of the debate and the speaker had used the word "consents" in referring to that kind of consent in the preceding sentence.

D. There Is No Authority for Departing from the Words of the Statute on the Basis of the Kind of Legislative History That Section 526 Had.

The Government invokes *Guerra*[25] as authority for departing from the literal meaning of the words of Section 526 on the basis of legislative history. (Br. 12-14.) In *Guerra* the Court found the clearest kind of evidence in the legislative history and historical context of the Pregnancy Discrimination Act of 1978 that it had been enacted for a very narrow purpose and construed its language correspondingly narrowly. This case is not at all the same even on the Government's view of the legislative history. The Government, while disagreeing with the view of the court below that the history confirms the breadth of the language of Section 526, is able to assert only "the absence of a clear legislative intent." (Br. 29.) The legislative history has provided a basis for something much more than that modest conclusion in all the cases cited by the Government and the private petitioners (47th St. Photo Br. 21-22, K mart Br. 15-19) in which this Court has seemingly strained congressional language because of the intent it found expressed in legislative history.

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[25] California Federal Savings & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987).

IV. THE CURRENT CUSTOMS SERVICE REGULATIONS REST ON NO EXPLICIT INTERPRETATIVE AUTHORITY OR AUTHORITY BORN OF AGENCY EXPERTNESS; THE AGENCY'S CONTEMPORANEOUS INTERPRETATION OF SECTION 526 ACCORDED WITH ITS TERMS, AND THE SUBSEQUENT INTERPRETATION HAS BEEN UNCERTAIN, WAVERING AND UNEXPLAINED.

We turn now to the administrative interpretation of Section 526. The Government and K mart give a new twist to the argument based on the administrative interpretation by their emphasis on the general rulemaking authority of the Customs Service. (Gov't Br. 3, 26, 31, 35, 45; K mart Br. 12-13.) The argument is not thereby improved, as we show immediately hereunder. Then we show that the contemporaneous administrative construction of Section 526, in 1923 and 1931, did not suggest the limitations on its scope imposed by the current regulations. Finally we explore the wavering course of administrative interpretation between 1936 and 1972 and even after the promulgation of the current regulations in the latter year.

A. Congress Did Not Delegate Authority to the Customs Service to Fill Gaps in, Enlarge, or Constrict the Basic Terms of Section 526(a).

Section 526(a) is not a statute, like so many, where an agency is directed to act in or promote the "public interest" or is given some other charter of comparable breadth. *E.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 379-80 (1969). All that the agency is directed to do is to exercise the power granted by Section 526(b) to seize goods that are imported in violation of Section 526(a). Congress did not phrase the basic terms of Section 526(a) in such a way as to invite agency interpretation. (*See* Gov't Pet. 22a.) The Customs Service does have general authority to make rules to enforce all the various provisions of the Tariff Act of 1930. § 624, 19 U.S.C. § 1624. But that authority does not enlarge

what would otherwise be its power to interpret particular provisions of Section 526.

In sharp contrast to the basic terms of Section 526(a) are the provisions dealing with the exemption for goods imported for personal use or consumption. Very broad power is expressly conferred on the Secretary of the Treasury by Section 526 and has been delegated by him to the Customs Service to determine what articles may be brought into the country by travelers pursuant to the personal consumption or use exemption and in what quantities, § 526(d)(2), and to make other rules and regulations to implement the exemption, § 526(d)(4). (P. 2a, *infra.*) When Congress grants that kind of power to fill in details it does so in the terms it used in Section 526(d). It used comparable language to empower the Federal Reserve Board to specify and amplify the terms and policy of the Truth-in-Lending Act, as elucidated in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973), one of petitioners' favored precedents on this point. It said nothing comparable concerning a power to make rules interpreting or carrying out the basic terms of Section 526(a).

The Customs Service was sensibly authorized to fill in the details of the personal use exemption, which Congress legislated in general terms, because, as a result of its experience, it is expert in the habits and needs of tourists. Its 1972 regulations limiting the reach of Section 526(a) have nothing to do with areas of agency expertise such as customs matters or fiscal policies. The Secretary of the Treasury has represented to inquiring Senators that the regulations are based on *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded*, 358 U.S. 915 (1958), *dismissed with prejudice*, 172 F. Supp. 107 (S.D.N.Y. 1959) (pp. 45-46, *infra*), in which antitrust notions led the district court to read Section 526(a) narrowly. (J.A. 82-85.) The court below divined that the Customs Service's narrowing of the basic terms of Section 526(a)—never contemporaneously explained by it—appeared to rest in part on the legislative

history and, noting the Secretary's letter, "in part on an accommodation of Section 526 with the policy of the antitrust laws." (Gov't Pet. 26a-27a.)

Neither the Customs Service nor its parent agency the Treasury is expert in antitrust matters.[26] The invocation of the *Guerlain* case as an underpinning of the 1972 regulations demonstrates the point. As the court of appeals put it, "prevailing antitrust doctrine has changed significantly since the *Guerlain* era." (*Id.* at 27a.) The district court's opinion in *Guerlain* disregarded interbrand competition and focused on the purported undesirability of allowing a distributor to place vertical restraints on the distribution of its products. The court also constructed a "market" for each of the perfume company defendants in *Guerlain* consisting of transactions in its own trademarked products, an odd concept even then.[27] 155 F. Supp. at 83-87.

With *Continental TV* v. *GTE Sylvania*, 433 U.S. 36 (1977), this Court has established that restrictions imposing the type of non-price "vertical restraints" involved in *Guerlain* are subject to the antitrust rule of reason and are not *per se* unlawful. The court below noted that "it is now recognized that domestic vertical restraints . . . may in fact have procompetitive effects." (Gov't Pet. 27a.) The promotion of interbrand competition stands high among such effects.[28] Similarly, the Court has repudiated the construction of the kind of narrow artificial markets that were constructed in *Guerlain* as a predicate for antitrust liability. *See, e.g., Rice* v. *Norman Williams Co.*, 458 U.S. 654, 661-62 (1982).

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[26] Or, apparently, in the uses of precedent. Because this Court vacated the district court's judgment, the *Guerlain* case has no precedential value even for another court. *E.g.*, Los Angeles County v. Davis, 440 U.S. 625, 634 n.6 (1979).

[27] *See, e.g.*, Handler, *Trademarks—Assets or Liabilities?*, 48 Trademark Rep. 661 (1958).

[28] *E.g.*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

Another proof of the inexpertness of the agency in antitrust matters is that, if vertical restraints are bad, it is not because of the corporate relationship of the parties to them. In commercial and economic terms there is little or no difference between the restraint effected by an agreement between an exclusive United States distributor that is independent (the Bourjois company, for example) and its supplier and the arrangement between a subsidiary United States distributor and its supplier. The ill-fated and short-lived *Schwinn* condemnation of non-price vertical restraints as per se illegal under the antitrust laws, which was the law when the Customs Service regulations were adopted in 1972, was born of the relationship between a manufacturer and unrelated distributors. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Since *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), indeed, it is only such a relationship that even raises an antitrust issue.

B. The Regulations Are Neither Consistent Nor Longstanding Interpretations of the Statute.

The agency's current regulations do not reflect either a longstanding or a consistent interpretation of Section 526. Moreover, it is ordinarily the contemporaneous agency interpretation that commands a reviewing court's respect. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). Here, the contemporaneous interpretations of Section 526 do not hint at the detailed limitations of the 1972 regulations. Later regulations do not manifest the kind of thoroughness, validity, and consistency of reasoning that this Court has said may entitle an agency's view of the meaning of a statute to deference.[29]

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[29] *See* Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981); Bowen v. American Hospital Ass'n, 106 S. Ct. 2101, 2122 n.34 (1986); Watt v. Alaska, 451 U.S. 259, 273 (1981).

1. *Contemporaneous Customs Interpretations Confirm the Broad Scope of Section 526.*

The contemporaneous interpretations of Section 526 gave the statute its full, unrestricted scope. Both in 1923 and in 1931, the Treasury considered the newly enacted statute and placed no restrictions on its applicability. Article 476 of the Treasury's customs regulations promulgated in 1923 tracked the language of Section 526. (J.A. 17-18.) It provided that "[t]rade-marks owned by an American citizen or by a corporation or association created or organized within the United States are entitled to the protection of section 526" if properly registered with the Patent Office and recorded with the Treasury Department.

The Treasury issued a second contemporaneous interpretation of Section 526, newly reenacted, in 1931. Article 518(a) of the Customs regulations as adopted in 1931 stated:

> "Entry is prohibited of imported merchandise bearing a genuine trade-mark when such trade-mark is recorded with the Treasury Department and registered under the trade-mark law of February 20, 1905, if compliance is had with all provisions of section 526 of the tariff act of 1930, provided the period of protection for such trade-mark has not expired." (J.A. 23; *see also* Arts. 518(b), 519(c), J.A. 23, 24.)

Thus, "the Customs Service gave no hint in its initial interpretations that it discerned implied limitations on the scope of Section 526." (Gov't Pet. 21a.) The Government says that these regulations "simply paraphrased the statute" (Br. 37 n.44), as if that were to denigrate them as contemporaneous interpretations.[30] It and K mart are reduced to baseless speculation that actual practice may

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[30] It would be a peculiar rule of law that held that only an agency regulation that contradicts the plain terms of a statute or qualifies (or expands) them in some way counts as an administrative interpretation.

not have accorded with the published views of the agency. (*Id.*; K mart Br. 32.)

2. *Subsequent Agency Interpretations Are Inconsistent and Confused.*

a. *The 1936 Regulations*

After 1931, there is neither consistency, validity, nor thoroughness in the agency's approach. In 1936, which is when the history of administrative interpretation begins for petitioners, the Treasury amended two sections of the regulations it had issued in 1931 under Section 526 and Section 27 of the Trade-mark Act of 1905. T.D. 48,537 (1936) (J.A. 27-29). Article 518, which had dealt solely with Section 526, was amended to take account of this Court's *Aldridge* decision of 13 years before (*see* pp. 13, 25, *supra*) and on its face made to deal only with Section 27. *Aldridge* had held that a genuine, identical trademark on goods offered for importation could unlawfully "copy or simulate" a United States trademark under Section 27. Article 518(b) was amended in 1936 to provide that a trade name or trademark on an article of foreign manufacture identical to a United States trade name or trademark "shall be deemed . . . to copy or simulate" the United States trade name or trademark. A marginal citation of *Aldridge* indicated the source of this rule. (J.A. 28.)

A second sentence of Article 518(b) provided, "[h]owever," that if the foreign name or mark and the United States name or mark were owned by "the same person, partnership, association, or corporation," the foreign name or mark should not be "deemed . . . to copy or simulate" the United States name or mark. No explanation was offered for this restriction. As the court below observed, it is doubtful that the restriction (any more than the statement in the first sentence of the *Aldridge* holding) was intended to apply to Section 526 as well as to Section 27. (Gov't Pet. 23a.) It was not necessary to go through the contortion of "deeming" a genuine trademark to "copy" or "simulate" a United States trademark

in order to bring it within Section 526, because Section 526 on its face applies to genuine identical trademarks. The amended Article 518, moreover, (1) applied to all trademarks "protected by the trade-mark laws of the United States," which includes trademarks owned by foreigners entitled to reciprocity, and those trademarks are not protected by Section 526, and (2) applied to trade names, which were dealt with in Section 27 but not in Section 526.[31]

Testimony at hearings on the bill that eventually became the Lanham Trademark Act of 1946 indicated that the 1936 version of Article 518(b) was relevant only to Section 27 and not to Section 526. *See Hearings on H.R. 82 Before the Subcomm. of the Senate Comm. on Patents,* 78th Cong., 2d Sess. 57-105, 141-54 (1944). The Tariff Commission, an agency concerned with the issue,[32] introduced a memorandum that said, referring in particular to the second, "however," sentence of Article 518(b), that it was "obviously addressed to section 27 of the Trade-Mark Act of 1905 in view of the reference to 'copy or simulate,' which expression is used in section 27 but does not appear in section 526 of the tariff act." *Id.* at 86-87. The memorandum added that Section 526 "does apply to the merchandise of the trade-mark owner which bears his trade-mark if the merchandise was produced abroad and if the trade-mark owner is a citizen of the United States." *Id.* at 87. The reason for the same-company qualification of the general rule of the *Aldridge*

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[31] Petitioners point out that the statutory authority for the 1936 amendments was stated to include Section 526 as well as Section 27 (J.A. 27), but that is of no significance. Article 522, also amended in 1936, was clearly issued on the authority of Section 526 (J.A. 29), and the statutory citation, given at the beginning of the Treasury Decision, was for the entire amendment.

[32] The Tariff Commission's successor, the International Trade Commission, has decided one of the important cases bearing on the meaning of Section 526 and Section 42 of the Lanham Act, successor to Section 27 of the Trade-mark Act of 1905. Certain Alkaline Batteries, 337-TA-165 (I.T.C. Nov. 5, 1984), *disapproved,* 50 Fed. Reg. 1655 (Jan. 11, 1985).

case under Section 27 was, the memorandum indicated, a conceptual problem with the idea that a person's own identical trademark could "copy or simulate" his United States trademark. *Id.*

b. *Developments in the 1940s and 1950s*

During the 1940s and 1950s, the Customs Service wavered. In 1943, when the relevant regulations were renumbered and recodified, an identical stock set of citations of statutory authority was set out for each section of the regulations in the series. Section 526 therefore became one of the authorities cited for the successor to Article 518, Section 11.14. (J.A. 39.) But Section 526 was also cited as authority for, *e.g.*, Section 11.16, a regulation concerned with recording trade names—a matter quite foreign to Section 526. (*Id.* at 42.)

On the other hand, Section 526 was deliberately and pointedly omitted from the citation of authority for Section 11.14 in 1953 when that section of the regulations was amended to provide that trademarks and trade names owned by related companies as well as those owned by the same company were not to be deemed to "copy or simulate" a genuine United States trademark. T.D. 53,399 (J.A. 56). The Government says that the omission of the citation "was plainly inadvertent." (Br. 38 n.47.) It relies on non-official contemporaneous commentators who did not read the fine print and assumed that the regulations continued to have the authority of Section 526 as well as that of what was now Section 42 of the Lanham Act. We cannot know for sure because on this occasion, as on all the other occasions when it wrote or revised regulations, the Customs Service offered no explanation. But inadvertence is a most unlikely explanation.[33]

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[33] A much more likely explanation is a decision that no regulations interpreting Section 526 were necessary or desirable. Not only was Section 526 omitted from every citation of authority (J.A. 56, 57, 58) but also the one substantive reference to Section 526 was deleted (*id.* at 58).

In 1957, the Solicitor General informed this Court that the Customs Service considered itself obligated under Section 526 to protect United States trademark owners affiliated with the owners of identical foreign marks. In *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded*, 358 U.S. 915 (1958), *dismissed with prejudice*, 172 F. Supp. 107 (S.D.N.Y. 1959), the Government sued three United States trademark owners that imported and distributed French perfumes in this country for alleged violations of the antitrust laws. (*See* pp. 38-40, *supra.*) The district court expressly found that the defendants, affiliates of the French manufacturers of the perfumes that were the owners of the French trademarks, had recorded their trademarks under Section 526 and the Customs Service had excluded "genuine" perfumes sought to be imported without their consent—what would be called gray-market perfumes today. *See* 155 F. Supp. at 90, 93-94, 96-97. The district court, in finding antitrust liability based on this invocation of the statute, interpreted Section 526 as not protecting a United States company that was part of an international enterprise against the importation of the enterprise's identically marked goods. *See id.* at 80. The Antitrust Division had urged this construction.

The trademark owners appealed to this Court. After probable jurisdiction was noted, 355 U.S. 937, 951, the Solicitor General filed a motion asking the Court to vacate the judgment and remand the case to the district court so that the Government could move to dismiss its own case. He said that the Antitrust Division and the Customs Service did not agree with one another on the interpretation of Section 526. He represented to the Court that "the customs authorities of the United States . . . have deemed themselves legally constrained to grant the claim of statutory protection invoked by" the American affiliates of the three French perfume companies.[34]

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[34] Guerlain, Inc. v. United States, No. 24 (O.T. 1958), Motion to Vacate Judgments, p. 7.

He said that legislation rather than an antitrust suit was the way to resolve the question and represented that the concerned agencies now agreed on legislation that would be introduced after the lawsuit was dismissed.[35] The Court granted the Solicitor General's motion. (*See* Gov't Br. 39 n.48.)

After the *Guerlain* events, the related companies exception was deleted from the regulations in 1959, as always without any explanation. T.D. 54,932 (J.A. 60). At the same time, Section 526 was again made authority for the regulations.

In addition to published regulations, there is one piece of desk-drawer law that antedates *Guerlain*, a 1951 letter from the Commissioner of Customs to Senator Douglas of Illinois, concerning the importation by a constituent of phonograph records from Canada or England. (J.A. 52-54.) The Commissioner told Senator Douglas that the records could be imported if they were made and trademarked by a foreign subsidiary of the United States trademark owner. It appears that the collector of customs in Chicago was not aware of this rule. Private Customs Service letters after *Guerlain* and the seemingly intentional deletion of "related companies" in 1959 from Section 11.14 indicated that nevertheless parent and subsidiary, even if not all commonly owned or controlled companies, continued to be treated as a single company. (J.A. 62-64.) That did not become the agency's public view until 1968. (P. 48, n.38, *infra.*) The Customs

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[35] It is hardly possible, as petitioners contend (Gov't Br. 39 n.48, 47th St. Photo Br. 35 n.23, K mart Br. 35 n.49), that the Solicitor General merely meant that it would be unfair to continue to proceed against the particular *Guerlain* defendants because the Customs Service had unwittingly applied the statute in their favor to bar the gray-market perfume, perhaps unaware of the true nature of their corporate relationships. That explanation does not accord with the necessity of seeking legislation; if a simple mistake had been made, it would have been enough if the Customs Service had vowed to take steps better to inform itself of corporate relationships of trademark recordants.

Service thus may not have paid attention to what exactly its own regulation said. The reliance on private understanding of what the law was makes thoroughly credible the varying treatment accorded to Senator Douglas's record-collecting constituent, on the one hand, and the would-be importers of gray-market French perfume, on the other, as well as the difference in the treatment of the record importer by the collector in Chicago and the Commissioner in Washington.

c. *The 1972 Regulations*

In 1972, the Customs Service adopted the regulations at issue here. 19 C.F.R. § 133.21(c)(1)-(3). (Pp. 4a-5a, *infra.*) Needless to say, neither the notice proposing the regulations, 35 Fed. Reg. 19,269 (Dec. 19, 1970), nor the final notice adopting them, 37 Fed. Reg. 20,677 (Oct. 3, 1972), gave any explanation of the provisions limiting Section 526 and Section 42. However, these regulations finally did state with some precision the circumstances in which the prohibitions of those sections do not apply. The first of the stated exceptions, for the case of ownership of the United States and foreign trademarks by the same company, had applied, according to the published regulations, to Section 42 (or its predecessor, Section 27 of the Trade-mark Act) since 1936 and to Section 526 perhaps from 1943 to 1953 and since 1959.[36] The second, the exception for the case of ownership of the two trademarks by parent and subsidiary or companies under common control, had *never* before applied to Section 526 according to any published regulations and had applied to Section 27 only between 1953

[36] The application to Section 526 is questionable between 1943 and 1953 because of the wholesale invocation of Section 526 as authority for sections of the regulations foreign to it. It is not clear that recordation of trade names (*see* p. 44, *supra*) is any more foreign to Section 526 than deeming genuine identical trademarks or trade names to copy or simulate United States trademarks or trade names.

and 1959.[37] The third exception, for the case in which the foreign trademark is applied with the authorization of the United States trademark owner, was a late addition, never before a part of the regulations and first stated in a Treasury decision in 1968. T.D. 69-12 (J.A. 65).[38]

Later, in what the court below called "yet another curious turn" in Customs' administration of Section 526 (Gov't Pet. 27a), the Customs Service in 1983 repudiated the position set forth in its 1972 regulations. In an amicus curiae brief bearing the name of the chief counsel of the Customs Service as well as that of the Assistant Attorney General in charge of the Antitrust Division, the Government urged the Court of Appeals for the Second Circuit to construe Section 526(a) "in accord with the normal meaning of the statutory language"—that is, without imposing distinctions based on corporate affiliation.[39]

C. The Customs Service Regulations Are Contrary to Clear Congressional Intent and They Must Be Invalidated On That Ground and, If Not, on the Ground That They Are Not Reasonable Interpretations of the Statute.

The intent of Congress is clear from the words of Section 526, the circumstances surrounding its enactment, and the specifics of its legislative history. The Customs Service's interpretation, which is not even claimed to date

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[37] *But see* note 38, *infra*.

[38] The same Treasury Decision stated, without professing to amend the regulations, that a trademark or trade name "on imported foreign-produced merchandise shall not be deemed to copy or simulate a registered trademark or trade name, if the foreign producer is the parent or subsidiary of the American owner or the firms are under a common control." (J.A. 65.)

[39] Brief for the United States as Amicus Curiae, p. 9, Bell & Howell: Mamiya Co. v. Masel Supply Co., 548 F. Supp. 1063 (E.D.N.Y. 1982), *rev'd*, 719 F.2d 42 (2d Cir. 1983). This brief can be found in the joint appendix filed in this case in the court of appeals, pp. 321-42.

from any earlier than 14 years after the statute was first enacted, began, as the court below found, with a set of regulations that "appeared to implement *another* statute" and has not "since that time been supported by anything more than poorly articulated and vacillating reasoning." (Gov't Pet. 28a; emphasis in original.)

In the circumstances, the guiding principle is that of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984), quoted this Term in *Cardoza-Fonseca, supra*, 107 S. Ct. at 1221: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Congressional intent is as clear as can be in this case. A court, "employing traditional tools of statutory construction," can ascertain the intent; the intent relates to "the precise question at issue," and therefore it "is the law and must be given effect." *Id.* Moreover, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Dimension Financial Corp., supra*, 474 U.S. at 368.

This is not a case for deference to the agency's interpretation of the statute in any event. In *Cardoza-Fonseca*, the Court declared that the principle of deference to administrative interpretations does not come into play unless there is a "gap left, implicitly or explicitly, by Congress" for the agency to fill in the application of a legal standard to a particular set of facts. 107 S. Ct. at 1221 (*quoting Chevron, supra*, 467 U.S. at 843, and *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). We do not deal here with any gap or with application of law to specific facts. We deal here with the breadth of the legal standard to be applied, a matter, like the meaning of "well-founded" fear of persecution, that is "well within the province of the judiciary." 107 S. Ct. at 1221-22.

Furthermore, the regulations do not represent a reasonable interpretation of the statute, contrary to what the Government maintains in what is apparently its prin-

cipal argument. (Br. 31-36.) The Government's view, stated baldly, is that, because "the legislative history of Section 526 does not explain the statute's scope and purposes in a clear, or even consistent manner" (Br. 32), the Customs Service is entitled to disregard the words of the statute and itself legislate on the basis of chosen themes from the history. That is not the kind of reasonable agency interpretation of a statute that this Court has deferred to. It is rather an unacceptable variant of the old saw: the legislative history is unclear so let us look at the statute. Here the Government says, the legislative history is unclear so ignore the words of the statute and choose what you will from the history.

V. SUBSEQUENT LEGISLATIVE EVENTS CONFIRM THAT SECTION 526 SHOULD BE INTERPRETED IN ACCORDANCE WITH ITS TERMS.

Petitioners urge this Court to ignore the plain meaning of Section 526, supported by the legislative history of its enactment and reenactment, because Congress has not enacted a law that refutes the interpretation of the statute embodied in the Customs Service's regulations. (Gov't Br. 41-43, 47th St. Photo Br. 36-40, K mart Br. 24-31.) That argument ignores both theory and fact. The theory, at the heart of our system of government, is that the Constitution contemplates rule by enacted law, not by mere silence. The fact is that Congress at least three times has refused to repeal or restrict the scope of Section 526 along the lines of the current Customs regulations and has never indicated its acceptance of those regulations.

A. Congress Has Acted Inconsistently with the View That It Has Ratified or Acquiesced in the Current Customs Service Interpretation of Section 526.

Congressional ratification of an agency's rulemaking is not to be lightly inferred. This Court has stated that "prolonged and acute awareness" by Congress of an agency's interpretation of a statute is a prerequisite to any imputed ratification. *See Bob Jones University* v. *United*

States, 461 U.S. 574, 601 (1983). As the court below noted, any less stringent standard would run counter to the constitutionally contemplated scheme of lawmaking. (*See* Gov't Pet. 29a.) Here any congressional "awareness" has been sporadic and necessarily as uncertain as the agency's own shifting and unreasoned position. If anything, Congress can more fairly be said to have rejected the agency's current view than ever to have ratified it.

At least three times Congress has been asked to repeal Section 526 or restrict its scope to something like what the current Customs Service regulations provide.[40] Each time it declined to do so. In 1944, the Department of Justice told the Senate committee considering trademark legislation that Section 526 had been abused to effect divisions of markets. *See Hearings on H.R. 82 Before the Subcomm. of the Senate Comm. on Patents*, 78th Cong., 2d Sess. 68 (1944). Congress declined the implied invitation to do something about it. Though early comprehensive trademark bills would have repealed Section 526 and written severe restrictions on the applicability of a new equivalent of Section 27, in the end Congress left Section 526 alone and simply reenacted Section 27 as Section 42 of the Lanham Act. *See* H.R. 1654, 79th Cong., 1st Sess. § 42 (1945); 60 Stat. 440.

In 1954 Congress was presented with a bill that would have modified Section 526 and in 1959 with a bill that would have repealed it. Neither was enacted. The 1954 bill, H.R. 9476, 83d Cong., 2d Sess. (1954), would have made Section 526 inapplicable when the United States trademark owner was affiliated in any way with the foreign trademark owner. However, that portion of the bill apparently proved controversial and was removed by unanimous consent during the House hearings with the

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[40] The Government cites (Br. 41 n.51) two other bills that were not passed, H.R. 7967, 86th Cong., 1st Sess. (1959), and S. 3713, 90th Cong., 2d Sess. (1968). The first dealt exclusively and the second principally with Section 42 of the Lanham Act, although the second would also have repealed Section 526.

concurrence of the Treasury. *See Hearings on H.R. 9476 Before the House Comm. on Ways & Means*, 83d Cong., 2d Sess. 9 (1954). The 1959 bill, H.R. 7234, 86th Cong., 1st Sess. (1959), was the Administration bill that the Solicitor General promised in his motion to vacate the *Guerlain* judgment. (P. 45, *supra.*) The agreed Administration solution was to repeal Section 526 entirely. No hearings were held on the bill, and it was never reported out of committee. The court below said appropriately that "the unsuccessful efforts in 1954 and 1959 to repeal or modify Section 526, if anything, would suggest that Congress *rejected* a narrow view of its scope." (Gov't Pet. 29a; emphasis in original.)

During this same period, Congress, as part of the Revised Organic Act for the Virgin Islands passed in 1954, decreed that neither Section 526 nor Section 42 should apply to the importation into the Virgin Islands of genuine foreign merchandise bearing a genuine foreign mark but should apply only when such merchandise was taken from the Virgin Islands to the mainland United States (or another possession). 48 U.S.C. § 1643. The purpose was to open the Virgin Islands, with their extreme dependence on the tourist trade, to trademarked tourist goods from abroad that apparently were being kept out. *E.g., Hearings on H.R. 2644 Before the House Subcomm. on Territories and Insular Possessions*, 82d Cong., 2d Sess. 13, 20-21, 32-35, 39-40 (1952). While there are instances of wholly independent United States ownership of trademarks identical to those affixed to goods abroad, the instances are not many and it could scarcely have been those few instances that elicited this tourist-development legislation.

B. Congress Did Not Ratify the Customs Service Interpretation When It Enacted the Personal Consumption or Use Amendment and Has Not Ratified It by Any Subsequent Action.

Congress in 1978 added an exception to both Section 42 and Section 526 for goods imported for personal use or consumption. Customs Procedural Reform and Simplifica-

tion Act of 1978, 92 Stat. 888. *See* 19 U.S.C. § 1526(d). (P. 2a, *infra.*) The exception was a long time coming. The Wonder Flour colloquy in 1922 suggested the need for it, and the *Sturges* case in 1931 was a reminder. (Pp. 29-30, 31-32, *supra.*) The Customs Service thought it could not create the exception itself, but that only Congress could, itself a lesson for this case. (*See* Gov't Pet. 30a.) When the exception was enacted, Section 526 was not amended in any other way, and there was no consideration of other amendments.

The slim thread by which the petitioners hang their 1978 acquiescence argument is the House committee report on this personal exemption legislation. The Senate committee and the Conference Committee simply paraphrased the statute even though by this time the 1972 regulations were in effect.[41] Each of the petitioners quotes a sentence from the House committee report.[42] The sentence, part of an attempted description of the statute as modified by the 1972 regulations, says that "for the past 20 years" Section 526 had been interpreted by the Customs Service

> "[a]s excluding from protection foreign-produced merchandise bearing a genuine trade-mark created, owned, and registered by a citizen of the United States if the foreign producer has been authorized by the American trademark owner to produce and sell abroad goods bearing the recorded trademark." H.R. Rep. No. 621, 95th Cong., 1st Sess. 27 (1977).

The quoted passage reminds one of petitioners' misreading of Senator Reed's remarks on the Senate floor in 1929 (pp. 34-35, *supra*)—suggesting an exclusion from the protection of Section 526 only of the United States company that authorizes the affixing of a trademark on foreign goods. That is a case far removed from the case of the parent foreign manufacturer and subsidiary United

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[41] S. Rep. No. 778, 95th Cong., 2d Sess. 22 (1978); H.R. Rep. No. 1517, 95th Cong., 2d Sess. 16 (1978).

[42] Gov't Br. 42, 47th St. Photo Br. 37, K mart Br. 28.

States distributor that petitioners generally focus on. The committee made a further attempt to describe the statute as limited by the regulations, saying (in a passage not quoted by petitioners) that, "if merchandise bears a genuine trademark created outside the United States the rights to which have been assigned to and recorded by a United States citizen, protection is also granted." *Id.*

The committee thus referred to only the least and latest of the three exceptions in the regulations and then contradicted the regulations by seeming to say that protection was granted to a United States citizen to whom was assigned a trademark created abroad regardless of the relationship between the buyer and the foreign seller. Its garbled description of the regulations is not evidence of ratification of the compelling nature that this Court has required. *See Bob Jones University* v. *United States*, 461 U.S. 574, 599-602 (1983); *Haig* v. *Agee*, 453 U.S. 280, 299 (1981).

The committee report on the bill that became the Trademark Counterfeiting Act of 1984 (Gov't Br. 43,[43] 47th St. Photo Br. 37-38, K mart Br. 29) does not garble the Customs Service regulations, but it is an example of the least reliable kind of post-enactment history: committee reports written or floor remarks made when a disputed matter that divides Congress is in litigation. This Court knows that such history is often created for partisan effect and that what is said will depend on which side which legislator takes. (One need only read Congressman Frenzel's remarks (K mart Br. 30) concerning a 1986 liquor import bill to understand the point.) The 1984 counterfeit legislation did not require any consideration of the terms of Section 526 so that expressions suggesting congressional satisfaction with the Customs Service's regulations are purely gratuitous. There is comparable "history" on respondents' side of

[43] The date of the committee report is 1984 and not 1982, as the citation in the Government's brief indicates (p. 42).

the issue, suggesting the deepest congressional dissatisfaction with the regulations. *See* S. Rep. No. 304, 98th Cong., 1st Sess. 9 (1983); 129 Cong. Rec. S15,742 (daily ed. Nov. 9, 1983); 129 Cong. Rec. S16,731-32 (daily ed. Nov. 17, 1983).

VI. THE CUSTOMS SERVICE'S REGULATIONS HAVE NEVER BEEN PRESENTED AS MERE ENFORCEMENT GUIDELINES AND CANNOT BE SUSTAINED ON THAT BASIS, NOR SHOULD THEY BE SUSTAINED ON THE NOVEL GROUND THAT GRAY-MARKET IMPORTERS HAVE RELIED ON THEM.

K mart alone among the petitioners argues that, even if Customs' regulations are not a valid interpretation of Section 526(a), they are proper as self-imposed discretionary limitations on agency-initiated enforcement. (Br. 14-15.) The Government has never explained the regulations as that kind of exercise of prosecutorial discretion, and it says in this Court that "[w]e do not believe that the Customs Service regulations should be viewed as based solely on enforcement considerations." (Br. 44 n.53.)

The enforcement guidelines theory derives from *Vivitar, supra*, 761 F.2d at 1569-70. The Federal Circuit held that the regulations did not correctly interpret the statute but sustained them nevertheless as enforcement guidelines. In *Olympus, supra*, 792 F.2d at 320, the Second Circuit followed that ruling.[44] The regulations cannot be so sustained. We believe that, under the statute as it is written, a policy of selective enforcement excluding whole large categories of cases would clearly be "an

[44] The Second Circuit clearly does not regard the regulations as purporting to limit the scope of the statute. *See* Original Appalachian Artwords v. Granada Electronics, Inc., No. 86-7670 (2d Cir. April 7, 1987), slip op. at 2277-78; *see also* Epocha Distributors v. Quality King Distributors, No. 86-2270 (E.D.N.Y. Jan. 20, 1987), slip op. at 2-3.

abdication of [the agency's] statutory responsibilities."[45] But that point need not be decided now.

The decisive fact for now is that the Customs Service has never tried to justify its regulations as an exercise of its enforcement discretion. On the contrary, Customs has consistently maintained that its regulations define the full scope of Section 526(a). Since Customs has never suggested that its challenged regulations rest on a reasoned exercise of any discretion it might have to enforce or not enforce, upholding them on that ground would run afoul of the familiar rule of *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943): an agency's action "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[46]

Indeed, because the agency has never purported in its regulations to be doing anything other than defining what goods are covered by the statute, the decisions of the two courts of appeals offend a principle of even longer standing than *Chenery*. The principle is that a reviewing court exhausts its function when it decides issues of law and instructs the agency on the law; it exceeds the proper function of the judiciary when it goes further and makes a decision of policy or discretion that Congress has entrusted to the agency. *Perkins* v. *Elg*, 307 U.S. 325, 349-50 (1939); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 19-22 (1952); *Sunray Mid-Continent Oil Co.* v. *FPC*, 353 U.S. 944 (1957). To sustain the regulations as enforcement guidelines would be effectively to write new regulations for the agency. If there is discretion to limit enforcement activities so severely as these regulations

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[45] Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985), *citing* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*).

[46] *See also* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

would, the discretion is the agency's, not a reviewing court's.[47]

The Government, while not asserting that the Customs Service has declined (or may decline) to enforce Section 526(a) to its limit, effectively asks this Court to do so in order to maintain what it regards as the status quo. (Br. 43-45.) This argument—that recent commercial activities of gray-market dealers, free-riding on the investments of American companies in their United States trademarks, should be permitted to continue because the burgeoning gray market is the "status quo" and represents "investment-backed reliance"—is novel. It is also without merit. A recent pattern of commercial activity cannot overcome clearly expressed statutory meaning. The cases cited by the Government do not support the proposition that it can. The cases simply observe that the Court may defer to reasonable and longstanding administrative interpretations, relied on by others, when the legislative intent of a statute is not clear.[48] That is not this case.

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[47] One of the stated justifications for the ruling in *Vivitar, supra*, 761 F.2d at 1570, reiterated in *Olympus, supra*, 792 F.2d at 322, is that certain factual issues would arise in the enforcement of Section 526 better suited for judicial than agency resolution. One such issue is suggested by the words elided from our quotation of this Court's *Katzel* opinion at p. 25, *supra*. Justice Holmes said that Bourjois's United States trademark "indicates in law, *and, it is found, by public understanding*" (elided words in italics) as well, that the face powder was its goods. But the court below pointed out that the suggestion that a trademark owner must demonstrate that he has in fact created an independent United States goodwill has no application to Section 526, given its unqualified terms. (Gov't Pet. 14a n.10.) There is no more need, under Section 526, to try the other issues that the court in *Vivitar* indicated might have been tried.

[48] In McLaren v. Fleischer, 256 U.S. 477, 481 (1921), the Court observed that the statute there was "fairly susceptible of different constructions," that the agency's construction of the statute was "reasonable" and was "acted upon for a number of years," before noting in passing that the rule had been relied upon. *Accord*, Zenith Radio Corp. v. United States, 437 U.S. 443, 450-51 (1978).

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

WILLIAM H. ALLEN *
EUGENE A. LUDWIG
SCOTT D. GILBERT
ELIZABETH V. FOOTE
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Respondents

* Counsel of Record

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